

ISSUE DATE: July 26, 1999

DOCKET NO. P-5772,421/M-99-702

ORDER REJECTING AGREEMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
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LeRoy Koppendrayer  
Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Joint Application for  
Approval of an Interconnection and Resale  
Agreement between IdeaOne Telecom Group,  
L.L.C. and US WEST Communications, Inc.  
under the Federal Telecommunications Act of  
1996

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**PROCEDURAL HISTORY**

On May 18, 1999, IdeaOne Telecom Group, L.L.C. (IdeaOne) and US WEST Communications, Inc. (US WEST) filed a joint request for Commission approval of an interconnection and resale agreement. On May 28, 1999, the Department of Public Service (the Department) filed comments recommending rejection of the agreement unless the following language were added to § 10.12, which governs US WEST DEX issues: "US WEST shall make its contracts/arrangements with US WEST DEX available for review by the Carrier."

On July 13, 1999, the matter came before the Commission for consideration.

**FINDINGS AND CONCLUSIONS**

**I. THE APPLICABLE LAW**

The federal Telecommunications Law of 1996 is designed to open the nation's telecommunications markets to competition, using three strategies:

- (1) requiring incumbent local exchange carriers to permit new entrants to purchase their services wholesale and resell them to customers;
- (2) requiring incumbent local exchange carriers to permit competing providers of local services to interconnect with their networks on competitive terms; and

(3) requiring incumbent local exchange carriers to unbundle the elements of their networks and make them available to competitors on just, reasonable, and nondiscriminatory terms.

47 U.S.C. § 251(c).

Under the Act, new market entrants are to seek agreements on these issues with incumbent local exchange carriers, who are required to negotiate in good faith. 47 U.S.C. §§ 251(c); 252(a)(1); 252(b)(5). All agreements reached must be submitted to the state commission for approval. 47 U.S.C. § 252(a) and (e).

The state commission is to approve or reject these agreements, making written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Negotiated agreements may be rejected for the following reasons: (1) they discriminate against a telecommunications carrier who is not a party to the agreement; (2) implementing them would be inconsistent with the public interest, convenience, and necessity; (3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements. 47 U.S.C. § 252(e)(2) and (3).

The Act provides that a local exchange carrier shall make available any interconnection, service, or network element provided under an approved agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i).

## **II. SUMMARY OF COMMISSION ACTION**

The Commission finds that it must reject the parties' proposed contract because of deficiencies in the contract terms governing the following areas: interim number portability; remedy for nonpayment of billed amounts; and default.

The Commission finds that the parties may either retain or remove the existing contract language regarding US WEST DEX.

These actions are explained below.

## **III. DEFICIENCIES REQUIRING REJECTION OF THE AGREEMENT**

### **A. Interim Number Portability**

In previous Orders, the Commission has found that interim number portability (INP) is essential to a competitive market, because customers who must change telephone numbers to change carriers have strong incentives to remain with their current carriers. Therefore, contracts that require companies to deny INP to customers who are allegedly in arrears in their payments to either of the two contracting companies are inherently anti-competitive. In effect, such contracts allow companies to use the threat of denial of INP as a joint collection device against both companies' customers. For these reasons, the Commission in a number of Orders has rejected contract

language that prohibits parties from providing INP for customers whose accounts are in arrears.<sup>1</sup>

In deference to the Commission's position on this issue, US WEST deleted § 8.1.2.4.4.1, which had allowed the companies to deny INP to customers whose accounts are delinquent<sup>2</sup>. However, US WEST did not remove related language from § 8.1.2.4.4, which states:

INP will not be provided by the INP provider for end users whose accounts are in arrears and who elect to make a change of service provider unless and until the following conditions are met...

Because the inclusion of the phrase "whose accounts are in arrears" in § 8.1.2.4.4 is contrary to the public interest, the Commission will reject the contract. Deletion of the phrase "whose accounts are in arrears" from § 8.1.2.4.4 would cure the cited deficiency and render this portion of the contract consistent with the public interest.

## **B. Default**

Section 22.12 of the agreement provides that, if either party defaults in payment or any other term of the agreement for a period of 30 days, the other party must notify the Commission in writing and may seek relief in accordance with the Dispute Resolution provision of the agreement.

Consistent with previous decisions, the Commission finds that the default provision, as submitted, is insufficient. The agreement does not make it entirely clear that the parties may not seek other remedies, such as self-help disconnection, to remedy defaults.

Termination of service to a reseller results in disruption of service to the reseller's end user customers. The public interest requires that underlying providers be required to seek and obtain Commission approval prior to any service termination. This requirement reflects the Commission's, and the state of Minnesota's, commitment to a reliable and universally accessible local telephone system. Language answering this requirement will ensure that the underlying provider's default remedies remain consistent with the public interest, convenience, and necessity.

For this reason, the Commission will reject the interconnection agreement as inconsistent with the public interest, convenience, and necessity. The Commission notes that adding the following language to § 22.12 would cure the insufficiency and render this portion of the contract acceptable:

Neither Party shall disconnect service to the other Party without first obtaining

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<sup>1</sup> See, for example, In the Matter of the Joint Application of Harmony International and US WE ST Communications, Inc. for Aproval of an Interconnection Agreement, Docket No. P-421/EM-98-1865, ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILINGS (February 22, 1999).

<sup>2</sup> US WEST stated, however, that it reserved its rights to seek judicial review of the provision and to reform the agreement as the result of successful judicial review.

Commission approval.

### **C. Remedy for Non-Payment**

Section 9.8.6.1 of the agreement, Remedy for Non-Payment of Billed Amounts, provides US WEST's remedy if IdeaOne fails to make complete and timely payments under the contract. Thirty days after providing IdeaOne with written notice of non-payment, US WEST may refuse additional applications for service by IdeaOne and/or may refuse to complete any pending orders for service by IdeaOne. The contract section ends by stating:

If USWC does not discontinue the provision of the services involved on the date specified in the thirty (30) days notice, and IdeaOne's noncompliance continues, nothing contained herein shall preclude USWC's right to discontinue the provision of the services to IdeaOne without further notice.

This section thus allows US WEST to terminate service to the other party without notice to the Commission or Commission approval. The Commission has consistently found such latitude inconsistent with the public interest. The Commission continues to do so in this agreement.

In this contract, however, § 22.12 (Default) also addresses US WEST's remedies upon the other party's default. When § 22.12 is amended to preclude disconnection without Commission approval, consistent with the Commission's suggested language (see the preceding section of this Order), the parties may delete § 9.8.6.1 and allow § 22.12 to govern all default situations. With these revisions, the contract will be consistent with the public interest.

### **IV. US WEST DEX**

US WEST's affiliate, US WEST DEX, publishes white and yellow page directories. Section 12 of the contract contains language requiring US WEST to ensure that US WEST DEX treats US WEST and IdeaOne in a competitively neutral manner. The language further states that US WEST DEX will give IdeaOne the same opportunity to provide directory listings as it provides to US WEST, or else give IdeaOne the share of revenues (based on the percentage of lines belonging to IdeaOne in the particular list) that US WEST receives from US WEST DEX.

In a recent United States District Court decision<sup>3</sup>, the Court found that the Public Utilities cannot require such language in an interconnection agreement because the requirement is in essence an attempt to regulate an entity--US WEST DEX--that lies beyond the Commission's regulatory authority. The Court remanded the issue to the Public Utilities Commission for further deliberations consistent with the Order. At this time, the issue has not yet come before the Commission on remand.

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<sup>3</sup> US WEST Communications, Inc. v. Garvey, et al., File No. Civ. 98-1295 ADM/AJB, MEMORANDUM OPINION AND ORDER, March 30, 1999, at p. 19.

In recent decisions<sup>4</sup>, the Commission has allowed parties to remove or retain similar contract language regarding US WEST DEX. The Commission has reasoned that, under the recent court interpretation, it can no longer require the language. At the same time, the Commission did not find the language discriminatory or contrary to the public interest and thus objectionable as part of a voluntarily negotiated agreement between the parties. The Commission will follow its precedent here and allow the parties to remove or retain the US WEST DEX language in the contract.

## **V. EXPEDITED APPROVAL PROCESS FOR REVISED CONTRACT**

It is important that the parties be permitted to begin performance under a revised interconnection agreement as soon as possible. The Commission will therefore delegate to the Executive Secretary the authority to examine any revised interconnection agreement filed by the parties, to confirm that the deficiencies identified in this Order have been corrected as recommended herein, and to issue a letter to the parties permitting the contract to go into effect as of the date of filing.

The Commission will so order.

### **ORDER**

1. The Commission rejects the IdeaOne/US WEST interconnection agreement and resale agreement for the reasons set forth in this Order.
2. Within two weeks of the date of this Order, the parties shall file a new agreement and resale agreement correcting the deficiencies discussed above or a statement explaining that they will not be making such a filing.
3. The Commission delegates to the Executive Secretary the authority to examine any revised interconnection agreement filed by the parties, to confirm that the deficiencies identified in this Order have been corrected as recommended herein, and to issue a letter to the parties permitting the contract to go into effect as of the date of filing.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

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<sup>4</sup> See, for example, In the Matter of the Joint Application for Approval of an Agreement for Service Resale between Convergent Communications Services, Inc. and US WEST Communications, Inc. under the Federal Telecommunications Act of 1996, Docket No. P-5673,421/M-99-487, ORDER APPROVING RESALE AGREEMENT (June 23, 1999).

Executive Secretary

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